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BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1323

JOSEPH M. MCCRANE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E) is reported at 527 F.2d 906. The opinion of the district court (Pet. App. G) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F) was entered on December 18, 1975, and a petition for rehearing was denied on January 15, 1976 (Pet. App. D). On February 4, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 15, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution's failure to disclose information affecting the credibility of a witness who

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testified solely with respect to two counts of the indictment entitles the defendant to a new trial on other counts based on independent evidence not affected by the testimony or credibility of that witness.

2. Whether the proper remedy for a breach of the prosecution's obligations of disclosure is dismissal of the charges rather than a new trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania,[1] petitioner was convicted of four counts of aiding the preparation of fraudulent income tax returns, in violation of 26 U.S.C. 7206(2), and was fined $5,000 on each count. Imposition of sentence of imprisonment was suspended, and petitioner was placed on concurrent terms of three years' probation on each count.

1. The evidence showed that in his capacity as finance chairman for a successful New Jersey gubernatorial campaign, petitioner devised a scheme in which willing donors could claim an unwarranted federal income tax deduction by disguising their political contributions as ordinary and necessary business expenses. Petitioner arranged for two complaisant public relations firms to act as conduits by issuing fictitious invoices for advertising services to selected contributors (Pet. App. 8a-10a). The donors then funnelled their contributions through these intermediaries as apparent consideration for services that were never performed (*ibid.*). Petitioner advised the

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[1]Petitioner was tried initially in the United States District Court for the District of New Jersey, but that court declared a mistrial because of juror misconduct (Pet. App. 8a n. 1). A second trial was commenced in that court but ended prematurely when petitioner's motion for a change of venue was granted and the case transferred to the Middle District of Pennsylvania.

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contributors to use the false documentation to justify the deduction of these "business expenditures" on their tax returns (Pet. App. 17a).

Count III of the indictment charged petitioner with having aided the filing of a false income tax return by Hialeah Race Course, Inc. On two occasions in 1969, petitioner caused an advertising agency to send Hialeah an invoice in the amount of $1,000 even though he knew that the agency had performed no services for the company (Pet. App. 17a, 35a). Petitioner, then Vice-President and General Manager of Garden State Racing Association, which owned a controlling interest in Hialeah, gave express instructions that the fictitious invoices be paid (Pet. App. 17a, 35a). The agency subsequently received two $1,000 checks from Hialeah, and, at petitioner's direction, the proceeds were used for campaign expenses. Hialeah deducted these political contributions as ordinary and necessary business expenses on its federal income tax returns (Pet. App. 9a, 17a, 35a).

Count IV of the indictment charged petitioner with having aided Trap Rock Industries, Inc., in filing a false income tax return. In order to solicit a substantial political contribution from Trap Rock, petitioner advised Mendelson, its general manager, that he would furnish fictitious invoices that would enable the corporation to deduct the contribution as a business expense for federal income tax purposes (Pet. App. 17a, 35a-36a, 39a, 53a). Petitioner knew that the advertising agency that furnished the invoices and received the money had not performed the services reflected on those invoices (Pet. App. 36a). Trap Rock paid the invoices with two checks, the proceeds of which were used for campaign expenses. It subsequently deducted the contribution as an ordinary and necessary business expense on its federal tax return (Pet. App. 17a, 36a). The district court noted that Mendelson's

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credibility was crucial to the government's case on this count (Pet. App. 53a).

Counts X and XI of the indictment charged petitioner with having aided the filing of two false income tax returns by the firm of Bellante, Clauss, Miller & Nolan, Inc., which pleaded guilty to separate charges of filing knowingly false income tax returns. E. Lawrence Bellante, president of that firm, was the government's principal witness on these charges. He testified before the grand jury and at trial pursuant to a grant of immunity. He stated that petitioner solicited two campaign contributions from him, arranged for the transmission of fictitious covering invoices from the advertising agencies, and counseled him to deduct the payments as ordinary business expenses (Pet. App. 9a, 36a). He also testified that the Bellante firm had deducted these contributions as business expenses for federal income tax purposes, despite his knowledge that the agencies had performed no services for his company (*ibid.*).

Bellante's testimony did not advert in any way to the separate contributions by Hialeah or Trap Rock or the preparation of their falsified federal income tax returns, the subject matter of Counts III and IV.

2. Shortly after his conviction, petitioner moved for a new trial on all counts, alleging that he had learned after the trial of the existence of certain letters written on Bellante's behalf by the United States Attorney. These letters explained the relationship between that office and Bellante and his firm to several of its current or prospective public authority clients. Petitioner contended that, had he been able to utilize these letters at trial, he could have impeached Bellante's credibility by showing that his testimony was influenced by preferential treatment received from the government. He argued that the prosecution's failure to disclose this impeachment evidence required a new trial on all counts under *Brady*

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v. *Maryland,* 373 U.S. 83, and *Giglio* v. *United States,* 405 U.S. 150.

The district court found that the letters were neither "favorable" to petitioner nor material under the standard set forth in *Giglio,* but merely contained factual recitations of the status of Bellante and his firm (Pet. App. 50a-51a). Accordingly, it denied all relief. The court of appeals affirmed petitioner's convictions on Counts III and IV but reversed his convictions on the charges involving the Bellante firm's tax returns and remanded those counts for a new trial (Pet. App. 19a). It found that the letters were "favorable" to petitioner for *Brady* purposes and that, in the particular context of Bellante's cross-examination, the letters might have been important to the jury in evaluating his motives for testifying for the government (Pet. App. 14a). Concluding that the letters were reasonably likely to have affected the jury's verdict, the court of appeals held that under *Giglio,* the prosecution's failure to disclose the letters to the defense necessitated a new trial "on the affected counts" (Pet. App. 8a).[2] However, the court upheld petitioner's convictions on Counts III and IV, which it implicitly found were not affected by Bellante's testimony or the jury's assessment of his credibility (Pet. App. 10a, 15a).

ARGUMENT

1. Petitioner contends (Pet. 10-11) that the court of appeals erred in not vacating and remanding his convictions for aiding the preparation of false income tax returns by Hialeah and Trap Rock. In essence, he challenges the court's factual determination that his convictions

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[2]The United States has filed a petition for a writ of certiorari seeking review of the court of appeals' award of a new trial on these two counts. *United States* v. *McCrane,* No. 75-1464, filed April 12, 1976.

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on Counts III and IV were not affected by the prosecution's failure to disclose evidence possibly impeaching Bellante's credibility. However, the court of appeals' decision is manifestly correct and does not warrant further review.

Under the materiality standard embodied in the *Brady* rule, the determination whether nondisclosed evidence could in any reasonable likelihood have affected the judgment of the jury must be made as to each defendant individually and on each separate count of which he was convicted. See *Fried* v. *United States*, 486 F.2d 201 (C.A. 2), certiorari denied, 416 U.S. 983; *United States* v. *Sperling*, 506 F.2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962; *United States* v. *Badalamente*, 507 F.2d 12 (C.A. 2), certiorari denied, 421 U.S. 911.

The record shows that the contributions underlying Counts III and IV were solicited from companies that were not in any way affiliated with Bellante's firm. Bellante's testimony provided no information concerning petitioner's communications with those contributors, the provision of fraudulent covering documentation to them by the advertising agencies, or petitioner's complicity in the preparation of those firms' fraudulent income tax returns. Indeed, the evidence showed that petitioner himself knowingly directed that payments be made on the fictitious invoices giving rise to Count III. Nor has petitioner alleged that Bellante's testimony in any way bore upon his solicitation of the contribution from Mendelson of Trap Rock. Therefore, the record clearly demonstrates no reasonable likelihood that further impeachment of Bellante's credibility, no matter how effective, could have influenced petitioner's convictions on Count III and IV.[3]

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[3]Whether petitioner engaged in a common course of conduct in soliciting these contributions is irrelevant to his conviction for

Since the charges relating to the Hialeah and Trap Rock tax returns were established by proof wholly independent of Bellante's testimony, they remain untainted by the prosecution's failure to disclose information arguably impeaching a witness who testified against petitioner on the other two counts. See *Fried* v. *United States, supra.* The trial court carefully instructed the jury that it must consider petitioner's guilt or innocence on each count individually.[4] There is no suggestion that the jury could not and did not follow that instruction. See *Bruton* v. *United States,* 391 U.S. 123, 135. Therefore,

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these substantive offenses. All the necessary elements of the offenses charged in Counts III and IV were sufficiently established by evidence of petitioner's communications with the officers of those companies (Pet. App. 17a-18a). Any showing of a common scheme was mere surplusage after the dismissal of the conspiracy count; thus, even if petitioner had refuted the existence of a common scheme, his convictions on these charges would nonetheless stand. Moroever, contrary to petitioner's assertion (Pet. 12, 14), additional evidence impeaching Bellante's credibility would not have affected the proof showing the circumstances under which he solicited the other, independent contributions.

Similarly, since Bellante's testimony did not provide any link in the chain of proof against petitioner on Counts III and IV, his inability to impeach Bellante fully on cross-examination did not affect his right of confrontation. See *Davis* v. *Alaska,* 415 U.S. 308, 317.

[4]The court charged the jury as follows (Pet. App. 18a, 65a):

> In deciding this case, * * * you are to consider each count individually. The fact that the Government has proved its case beyond a reasonable doubt or has failed to prove its case beyond a reasonable doubt as to any single count does not in and of itself require a finding of either guilty or innocent as to any other count. It is your obligation and duty to consider each count individually and arrive at a separate finding of guilty or innocent as to each of the four counts in the indictment. And as to each count you are to determine guilt or innocence only on the evidence that applies to that particular count.

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the court of appeals properly held that the nondisclosure of the United States Attorney's letters did not entitle petitioner to a new trial on those charges unaffected by Bellante's reliability as a witness.

2. Petitioner also contends (Pet. 15) that the prosecution's "deliberate, advertent suppression of this exculpatory evidence" entitles him to dismissal of the entire indictment, rather than retrial on the affected counts.

This argument is based entirely (Pet. 9) on the court of appeals' statement that "the prosecution chose to ignore the sage admonition of the pretrial judge and took it upon itself to decide a serious legal question adversely to the defendant" (Pet. App. 15a). However, as we stated in our separate petition for a writ of certiorari in this case (*United States* v. *McCrane*, No. 75-1464, p. 17), this characterization of the prosecution's behavior is improper. The concept of "deliberate suppression" implies an element of willfulness or a conscious obstruction of the defense. See *United States* v. *Ott*, 489 F.2d 872 (C.A. 7); *United States* v. *Miller*, 411 F.2d 825, 832 (C.A. 2). If a prosecutor is aware of the existence of information in his files and decides in good faith that he is not required to disclose it, that decision should not be considered as a deliberate suppression of evidence. See, *e.g.*, *United States* v. *Pfingst*, 490 F.2d 262 (C.A. 2), certiorari denied, 417 U.S. 919; *United States* v. *Keogh*, 391 F.2d 138 (C.A. 2). Since there was no hearing on petitioner's motion for a new trial, there is no support in the record for petitioner's assertion that the prosecution deliberately withheld this information.[5]

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[5]There is no evidence of record, moreover, that the prosecutors ever consciously considered the question whether they had a duty to disclose the letters, let alone whether, if they did consider the question, it was determined in bad faith that disclosure should not be made.

Moreover, even if the prosecution's failure to disclose this evidence had been intentional, the decisions of this Court clearly demonstrate that the proper remedy for a *Brady* violation is not dismissal of the affected charges, but the award of a new trial at which all relevant evidence may be presented to the trier of fact. In *Giglio* v. *United States, supra,* the Court held that the government was chargeable with deliberately deceiving the jury by failing to correct false testimony critical to the credibility of a key government witness. Nevertheless, the court simply remanded the case for a new trial at which the impeachment evidence would be made known to the jury (405 U.S. at 154-155).

Brady v. *Maryland, supra,* established no broader principle. There, even after a specific defense request, the prosecution selectively failed to reveal exculpatory evidence which would have been crucial to the jury's consideration of the punishment properly to be imposed. This Court held that the decision of the Maryland courts limiting the scope of the retrial to the issue of punishment did not violate the defendant's federal constitutional rights.[6]

Similarly, the courts of appeals are in agreement that the proper remedy for *Brady* violation is not dis-

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[6]By analogy to the enforcement of the Fourth Amendment's protections through the judicially-fashioned exclusionary rule, petitioner suggests (Pet. 17-18) that merely requiring a new trial at which the previously withheld information may be utilized is an insufficient deterrent sanction for *Brady* violations. However, this proposition contains its own refutation, for even under the exclusionary rule, the remedy for a violation of the defendant's consitutional rights is a new trial at which the illegally seized evidence cannot be introduced. This argument also answers petititioner's invitation (Pet. 20-21) to this Court to exercise its supervisory power over the administration of justice by imposing a stronger deterrent sanction in *Brady* cases than the Constitution requires.

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missal of the entire indictment but vacation of the conviction on the affected charges and remand of the case for a new trial at which the trier of fact may exercise its judgment with all relevant evidence before it. See, *e.g., United States* v. *Agurs,* 510 F.2d 1249 (C.A. D.C.), certiorari granted, November 11, 1975, No. 75-491; *United States* v. *Gerard,* 491 F.2d 1300 (C.A. 9); *United States* v. *Harris,* 462 F.2d 1033 (C.A. 10). Thus, contrary to petitioner's assertion, *Brady* and its progeny do not require that this indictment be dismissed.[7]

3. The government's petition for certiorari (No. 75-1464) presents the question whether the court of appeals was correct in determining that the prosecution violated its duty of disclosure by failing to disclose the letters written on Bellante's behalf. This issue, which we believe to be a substantial one warranting consideration by this Court, is wholly independent of the issues presented by petitioner herein. Accordingly, should the Court be disposed to grant the government's petition, there is no need to hold or to grant the instant petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

CROMBIE J.D. GARRETT,
RICHARD B. BUHRMAN,
Attorneys.

MAY 1976.

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[7] The question whether a different principle would be appropriate in cases showing a consistent pattern of gross misconduct by the government (see *United States* v. *Banks,* 383 F. Supp. 389 (D. S.D.)) is not presented in this case.

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